IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. ~~744~~ 53

PATRICIA WALDRON, as executrix of the last will and testament of GERALD B. WALDRON, Deceased,

Petitioner,

—against—

CITIES SERVICE CO.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Opinions Below

The unanimous opinion of the United States Court of Appeals for the Second Circuit affirming the decision of the United States District Court for the Southern District of New York is reported at 361 F. 2d 671 (2d Cir. 1966) and is printed in Appendix B to the petitioner's brief at pp. 36-39.

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* The following defendants remain parties to this action: British Petroleum Co., Ltd., Socony Mobil Oil Co., Inc., Standard Oil Co. of California, Standard Oil Co. (New Jersey), and Texaco, Inc. Petitioner's case against these other defendants is still pending in the United States District Court for the Southern District of New York. Summary judgment was granted and affirmed in favor of one defendant only—Cities Service Co.

The opinion of the District Court (Herlands, *J.*) is reported at 38 F. R. D. 170 (S. D. N. Y. 1965) and is printed in Appendix B to the petitioner's brief at pp. 40-50 and in Pltf's App. 5a.*

Questions Presented

1. Is summary judgment appropriate under Rule 56 of the Federal Rules of Civil Procedure where the movant has conclusively demonstrated that there is no genuine issue of fact to be tried in a litigation pending 9½ years, and plaintiff, after extensive discovery, has utterly failed to produce any evidentiary data indicating that a genuine issue of fact does exist?

2. Should a petition for certiorari be granted to review an alleged misapplication of summary judgment procedures when such an issue has never been asserted in either the District Court or the Court of Appeals below?

3. On a motion for summary judgment under Federal Rule 56, is it an abuse of discretion for the Court to deny plaintiff further discovery after

(a) he has extensively examined the movant and its records on every claim he has asserted,

(b) movant has conclusively demonstrated that there is no issue of fact to be tried,

(c) plaintiff has not produced any evidentiary data supporting his claims, and

(d) where the court "is convinced to a legal certainty" that plaintiff has no case against the movant whatsoever?

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* Parenthetical references are to the appendices to the briefs of the parties in the Court below which are part of the record filed in this Court.

Statement of the Case

In this Court, petitioner once again speculates whether respondent Cities Service ("Cities") *may have* conspired with other defendant oil companies to boycott petitioner's marketing of nationalized Iranian oil in the United States, and seeks reversal of the unanimous judgments below in order to pursue his speculations.

During nine-and-a-half years of litigation in this case, petitioner's counsel's fertile imagination has produced no fewer than four sweeping speculations—all of them demolished—concerning Cities' relations with the other defendants, without a grain of evidence or a specific fact to support any of them.

These contentions have been completely rejected by every judge who has considered the matter.

In fact, the record below is filled with assertions which petitioner has made and then abandoned when Cities demonstrated that petitioner's conclusory allegations were wholly without foundation.

It should also be noted at the outset, that petitioner has examined Cities officials on every matter relevant to the issues he has at any time asserted. After all this examination, petitioner was brought to the point where he no longer asserted a fact but asked a question: "Did Cities conspire?" At this point, Cities had long since met its burden of demonstrating that there was no genuine issue of fact to be tried. Petitioner totally failed to present any specific facts or to point to any material issues for trial. He did not even have a particularized question to ask, but relied on an ultimate conclusory query—"Did Cities conspire?"—as though that constituted the assertion of a proposition of

fact the denial of which created a factual issue which could defeat summary judgment.

This case has been exhaustively considered by at least four judges below. Judge Herlands, of the United States District Court for the Southern District of New York, who lived with this case for six years, and who granted petitioner opportunity after opportunity to examine Cities' officials and documents, finally concluded after painstaking consideration that he was "convinced to a legal certainty" that petitioner had no case against Cities whatsoever, and granted respondent's motion for summary judgment which had been pending for five years.

The Second Circuit unanimously affirmed Judge Herlands' decision and found that "We are convinced that as the record now stands the grant of summary judgment to the defendant [Cities Service] was proper. After nine years in the district court it is plain that the plaintiff has not established the existence of any 'genuine issue, as to any material fact.' F. R. Civ. P. 56(c); see F. R. Civ. P. 56(e). Indeed, the record is barren of any facts which would support the existence of a claim against Cities Service." (Petition pp. 37-38; 361 F. 2d at 672.)

Petitioner asserts *for the first time before this Court* that the District Court and the Court of Appeals somehow misapplied the summary judgment procedures under Rule 56 of the Federal Rules by "relieving defendant of the burden of demonstrating the absence of a genuine issue of fact on its motion for summary judgment, and imposing the converse burden on plaintiff". (Petition, p. 13)

Petitioner is fighting a strawman which he has created.

Neither the District Court nor the Court of Appeals for the Second Circuit decided that Cities did not have to demonstrate that there was no triable issue of fact in this

case. Rather, both courts found that *Cities had made that very demonstration.* Through Waldron's deposition, his concessions and admissions below, and the undisputed documents from Cities' files, Cities was entitled to summary judgment because petitioner's case against Cities was thus shown to be wholly without merit.

In order to claim that the District Court and the Court of Appeals deliberately changed and revolutionized the summary judgment procedures of Rule 56 (and that their opinions thus conflict with those of every other court, Petition pp. 13-19; 22-31) petitioner has been forced to distort and mis-characterize the entire factual record below and the opinions themselves of both the District Court and the Court of Appeals.

In arguing that both the District Court and the Court of Appeals placed the entire burden of proof on petitioner, petitioner neglects to cite or refer to even a single affidavit or exhibit submitted by Cities Service in the ten years of litigation. Petitioner would have it appear that all that Cities did was serve a naked notice of motion for summary judgment and that the courts then turned to petitioner and required him to produce specific facts to oppose this unsupported notice.

Nothing could be further from the truth. The 461-page appendix submitted by Cities below (which is included in the record here) represents only part of the materials produced by Cities in support of its summary judgment motion, and it is on those documents and those excerpts from Waldron's own deposition and admissions that Cities moved for summary judgment.

It was those indisputable facts and records which indicated that petitioner had no case against Cities. It was after this demonstration by Cities that the lower courts looked

to petitioner to supply any evidentiary facts at all to support any claim against Cities and to refute Cities' massive proof.

Thus, petitioner's position that Cities has never contended that it did not engage in the alleged conspiracy, but merely challenged petitioner's "proof of the precise inducements for Cities to join" (Petition, pp. 23, 14) is incredible, and completely ignores the nine and a half years of litigation that preceded his petition. To take but one example, Cities argued in its brief, in the Court of Appeals:

> "[The] undisputed record . . . compels the conclusion that Cities never engaged in the conspiracy plaintiff alleges."

Petitioner's argument also misconstrues Rule 56 of the Federal Rules of Civil Procedure. Petitioner appears to assert that the Courts below looked only to Rule 56(*e*) and required petitioner to come forward with evidentiary facts to defeat Cities' motion for summary judgment (e.g. Petition, p. 17).

Rule 56(e) provides in part:

> "when a motion for summary judgment is made *and supported as provided in this rule,* an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." (Emphasis added.)

Rule 56(c) provides in part:

> "The judgment sought shall be rendered forthwith *if the pleadings, depositions, answers to interrogato-*

ries, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

What petitioner ignores is the fact that Cities had demonstrated, pursuant to Rule 56(c) that there was no issue of fact and that it was entitled to judgment. Cities provided precisely the kind of "support" that Rule 56(e) requires.*

Accordingly, Cities having shown there was no factual issue for trial, and having fully supported its motion, petitioner could not rest upon the "mere allegations . . . of his pleading" but was required under Rule 56(e) to provide specific facts showing that there was a genuine issue. This he has failed to do. The combination of Cities' demonstration and petitioner's failure to counter Cities' materials led the courts below to grant and affirm Cities' summary judgment.

The incontrovertible and uncontroverted documentary record compiled below, petitioner's abandonment of his allegations and petitioner's three critical admissions clearly demonstrate that Cities was properly granted summary judgment below.

The three critical admissions were:

1. That Cities was not a conspirator at all the crucial times relevant to petitioner's assertions;

2. That Cities maintained a consistent course of conduct with regard to Iranian oil and never lost interest or

* The Court of Appeals referred to both Rule 56(c) and 56(e) in holding that there was no genuine issue of fact. Petition p. 38; 361 F. 2d at 672.

had a change of heart, as petitioner had repeatedly asserted; and

3. That Cities persisted in opposing the interests of the alleged conspirators and monopolists and "watched with resentment when the Iranian pie was cut up" without the independent, "have-not" oil companies like Cities gaining significant participation.

Throughout his petition here, as in his arguments below, petitioner ignores the basic summary judgment principle which was fatal to his case: that summary judgment may not be defeated by mere conclusory allegations concerning ultimate facts contained in a pleading.

To demonstrate the spurious nature of plaintiff's petition concerning summary judgment on the facts of this case, it will be necessary to describe in some detail the long history of this litigation which led to Cities being granted summary judgment five years after its Rule 56 motion was originally made.

History of the Litigation

1. The Complaint

On June 11, 1956, Gerald Waldron, a Denver food broker, filed a complaint against Cities and six other oil companies, seeking $109,260,000 in treble damages. He claimed that defendants had conspired to frustrate his efforts to sell expropriated or nationalized Iranian crude oil in the United States under an alleged contract which he obtained from the National Iranian Oil Company on May 25, 1952. That alleged contract was made after the Iranian Government had nationalized foreign oil properties.*

* It should be noted that a serious cloud on title to Iranian oil existed during the pendency of the bitter dispute between Great Britain and Iran after nationalization in 1951.

Petitioner concedes that his complaint was, insofar as it alleged an oil cartel, essentially copied from a complaint in a civil action brought by the United States. *United States* v. *Standard Oil Co. (New Jersey), et al.*, Civil Action No. 86-27 S. D. N. Y. (Petition, p. 3). He does not make clear, however, that Cities was not a party defendant to that action. The Government's complaint did *not* allege that *Cities* was a participant in any Middle East oil conspiracy. Indeed, Cities was not even mentioned in that complaint.

In his complaint Waldron made clear the distinction between Cities and the other defendants.

The complaint began by alleging that a conspiracy in restraint of interstate and foreign commerce in oil (which allegedly began in 1928) was, in 1934, joined by all the named defendants *"except Cities Service"* (Complaint, June 11, 1956, ¶¶8, 9, 10f; Deft's App. 48a-54a).*

Pursuant to the alleged conspiracy, all the defendants, *other than Cities Service,* allegedly have controlled foreign production and supplies of oil, divided foreign and domestic producing and marketing territories, fixed prices, controlled available tanker facilities, and engaged in other antitrust violations (Complaint, June 11, 1956, ¶¶8, 9 and 10; Deft's App. 48a-63a).

Even in speaking of his own experience with the so-called crude oil cartel, plaintiff cast Cities in a peripheral and peculiar role. In May 1951 the Iranian Government nationalized the oil properties of defendant Anglo-Iranian (now British Petroleum) (Complaint, June 11, 1956, ¶10(i); Deft's App. 55a-56a). According to the complaint, defen-

* All references preceded by "Deft's App." refer to the Appendix of Defendant-Respondent below, which is part of the record filed here; references preceded by "Pltf's App." refer to the Appendix of Plaintiff-Appellant below, which is also part of the record filed here.

dants *"other than Cities"* then agreed not to deal in Iranian oil until they could preserve the allocations established by conspiratorial agreement (Complaint, June 11, 1956, ¶10(i) (2); Deft's App. 56a-58a).

After plaintiff obtained his alleged oil contract on May 25, 1952 from the National Iranian Oil Company, plaintiff claimed defendant Anglo-Iranian (now British Petroleum) threatened him and others that legal action would be taken against them if they dealt in the nationalized oil (Complaint, June 11, 1956, ¶10(i) (2); Deft's App. 56a-58a). Plaintiff claimed Anglo-Iranian (British Petroleum) and other defendants *"excepting Cities"* instituted a boycott of Iranian oil in order

> "to force the Iranian Government to return its oil concessions, if not to Anglo-Iranian in whole, at least to the defendants jointly, *excepting Cities Service,* under such terms as would preserve the essential allocations previously agreed upon . . ."
> (emphasis added)

(Complaint, June 11, 1956, ¶10(i) (2); Deft's App. 57a-58a).

The complaint alleged that plaintiff never sold any of the oil to which he had access under his contract, and that his inability to do so was the result of an alleged boycott. He claimed that defendants, *"other than Cities Service"* (i.e., New Jersey Standard, Texas, Socal, Gulf and Socony) "refused to purchase Iranian oil from plaintiff"; threatened their "subsidiaries, agents or purchasers with being "barred from purchasing petroleum and products owned or controlled by defendants"; and "caused normal and customary financial services necessary to the transaction of international business to be denied to plaintiff" (Complaint, June 11, 1956, ¶10(i) (2, 3, 4, 5); Deft's App. 56a-59a).

Plaintiff claimed that his efforts to market Iranian oil were finally frustrated by the entry on October 29, 1954 of defendants *other than Cities Service* (i.e., Anglo-Iranian (British Petroleum), New Jersey Standard, Socal, Texas, Gulf and Socony) into a Consortium which divided up substantially all Iranian oil production among these defendants (Complaint, June 11, 1956, ¶10(i) (9); Deft's App. 62a).

2. The Unusual Role of Cities Service As Alleged

As has been seen, plaintiff cast Cities in a unique and peripheral role in his complaint. He specifically alleged that Cities had no oil interests in the Middle East prior to 1952, and that it was not a member of the alleged oil cartel. (Complaint June 11, 1956, ¶10(i) (6); Deft's App. 59a-60a).

In fact, plaintiff pleaded that Cities, as an independent, sought to aid plaintiff in his Iranian venture in the face of the alleged boycott of the other defendants.

Plaintiff maintained that he approached Cities in July of 1952 and that Cities "indicated . . . a great interest in purchasing [plaintiff's] entire supply and obtaining a managerial contract for all Iranian oil exploitation and production from the Iranian Government" (Complaint, June 11, 1956, ¶10(i) (6); Deft's App. 59a). In August of 1952, W. Alton Jones, then president of Cities, went with the plaintiff and several staff aides to Iran and inspected the oil facilities there. According to plaintiff, Cities then "proposed to the National Iranian Oil Company that over a course of years Cities Service would exploit and manage the Iranian oil resources . . ." (Complaint, June 11, 1956 ¶10(i) (6); Deft's App. 59a-60a).

A single subparagraph of the complaint then stated plaintiff's charges against Cities.

3. Plaintiff's Charges Against Cities Service: Kuwait as a Bribe and Consortium as a Reward

According to the complaint, Cities joined the alleged conspiracy for the first time "during late August or early September, 1952" (Complaint, June 11, 1956, ¶10(i) (6); Deft's App. 60a) and was enticed by the alleged conspirators Gulf and Anglo-Iranian into breaking off negotiations with plaintiff concerning Iranian oil. Plaintiff asserted two reason for Cities' alleged behavior.

First, the complaint charged that Gulf and Anglo-Iranian bought off Cities by offering it a long-term supply of crude oil from Kuwait at a favorable price which Cities accepted (Complaint, June 11, 1956, ¶10(i) (6); Deft's App. 60a-61a). According to the complaint

> "*At this time and by these acts* Cities Service, without the knowledge of plaintiff, entered into combination and conspiracy with the other defendants . . ." (emphasis supplied)

Secondly, plaintiff attempted to link Cities to the conspiracy by alleging that "as a further consequence of this conspiracy" Cities was allowed by the other defendants to "purchase a participation" in the Iranian Oil Consortium which was entered into more than two years later by defendants *other than Cities Service* (Complaint, June 11, 1956, ¶10(i) (6), (9); Deft's App. 61a-62a).

4. Waldron's Deposition

Plaintiff's bitter complaints about his deposition (Petition, p. 8) have nothing to do with Cities Service or this petition.

Cities' examination of the plaintiff on his $109 million claim lasted only 3½ days and was conducted on October

26-29, 1959. In Mr. Waldron's examination, he repeatedly conceded that but for two alleged acts—the alleged Kuwait deal and the alleged offer to Cities of a Consortium participation—he had no complaint against Cities and would not have joined Cities as a defendant in this action.

"Q. Do you put them [Cities Service] into the conspiracy which you allege, which you say began in 1928?

"A. No, sir.

"Q. You don't put them into this conspiracy until a very much later date, is that right?

"A. That's correct.

"Q. And what is the later date that you pick as the date on which you said they joined this conspiracy of the other defendants?

"A. The latter part of 1952 or the first part of 1953.

"Q. And what is the event which you believe justified you in saying that they joined this conspiracy?

"A. The event was when they made the arrangements with Gulf Oil Corporation to take oil from Kuwait.

"Q. It is that event which led you to believe that Cities Service joined the conspiracy?

"A. As well as their ending up in the International Oil Consortium in Iran.

"Q. That came later?

"A. Yes.

* * *

"Q. The event that you know of is the making of the contract with the Gulf Oil Company?

"A. Yes, sir.

"Q. And that is why you put Cities Service into this complaint as a defendant; is that right?

"A. That's one reason.

"Q. And the other reason is the Consortium?

"A. The Consortium. That's all the reasons that I know of at this time.

* * *

"Q. And of this morning you are telling me—and I assume truthfully—that the two events which you identify as causing you to name Cities Service as a defendant are the contract with Gulf and the entry into the Consortium?

"A. Yes, sir.

(Deposition of Gerald B. Waldron, Deft's App. 85a-86a).

* * *

"Q. Isn't that a correct statement of affairs, that with respect to the entire conspiracy recited in subdivisions 8 and 9, [of the complaint] down to Kuwait, down to the making of the Kuwait contract, you have no complaint with respect to Cities Service?

"A. In general, I would say that is correct, sir.

(Deposition of Gerald B. Waldron; Deft's App. 102a).

"Q. But for those two events that have already been mentioned, have you any evidence to suggest that Cities Service was a party to a conspiracy or did any acts to further a conspiracy to divide foreign producing and marketing territories?

"A. I don't know.

"Mr. Lane: The question is, have you any?

"A. (Continuing) No.

"Q. But for those two events, have you any evidence that Cities Service was party to a conspiracy or did any acts in furtherance of a conspiracy to maintain and correlate domestic and world prices of petroleum and products?

"A. The same answer.

"Q. No?

"A. Yes.

"Q. And but for these two events, have you any evidence to suggest that Cities Service was a member of a conspiracy or did acts in furtherance of a conspiracy to control imports of petroleum and petroleum products into the United States?

"A. No."

(Deposition of Gerald B. Waldron; Deft's App. 110a-111a).

The complaint and depositions established that Cities was interested in something other than the purchase of a few cargoes of Iranian oil, which, if anything, is all plaintiff had to sell.

The complaint alleged that Cities' proposal to the Iranians covered management of the entire Iranian oil industry. And Waldron testified on his deposition:

"We learned that Cities Service Company was interested in taking over the refinery at Abadan and all of the Iranian oil installations.

* * *

"Q. Was it your impression that you generated this notion of taking over the refinery and managing the whole Iranian oil business?

"A. No.

"Q. You discovered that to be there when you first contacted the Cities Service people?

"A. Not on the first contact with them.

"Q. But shortly thereafter?

"A. Some time thereafter."

(Deposition of Gerald B. Waldron; Deft's App. 80a).

"Q. Did Cities Service ever negotiate with you for the purchase of your oil under your contract with NIOC?

• • •

"A. I am trying to understand what you mean by the word 'negotiate'.

"Q. Did they offer to buy some of your oil under your contract, or all of it under your contract?

"A. The only way I can express that, Judge,* is that it was understood that they would take oil under our contract, which in turn would become part of a larger overall contract which they would negotiate with the Iranians.

• • •

"Q. Did they ever negotiate with you for the purchase of oil under your contract independent of any other relationship they might have with the Iranian supply?

"A. No."

(Deposition of Gerald B. Waldron; Deft's App. 99a-110a).

5. The First Episode in Cities Service's Motion for Summary Judgment: April 8, 1960

Plaintiff's conjecture about Kuwait oil and the Consortium was wholly and totally wrong. On his deposition, plaintiff testified that he joined Cities as a defendant in this colossal $109 million antitrust action on the basis of a newspaper clipping which plaintiff read in *1954* which stated that a deal had earlier been consummated between Cities and Gulf on Kuwait oil and on a snatch of conversation in plaintiff's presence in August or September 1952 by

* Refers to Simon H. Rifkind, attorney for Cities, who was conducting the examination.

W. Alton Jones, then president of Cities, who allegedly stated that he had had an offer for oil from across the Gulf, presumably Kuwait, at $1.00 a barrel (Deposition of Gerald B. Waldron; Deft's App. 87a-94a).

Plaintiff conceded that he had no oral or written evidence to support his allegation that Anglo-Iranian (British Petroleum) and Gulf conspired to make an offer of Kuwait oil to Cities. *He was "guessing."* He also *"guessed"* that the offer was made in August or September 1952, and he admitted Jones did not say when the offer was received (Deposition of Gerald B. Waldron; Deft's App. 88a-89a).

As for the Consortium, plaintiff admitted he had nothing to support his allegation—nothing in writing, no conversation. His empty response to a request for specific information was only, "The events speak for themselves"—an inference plaintiff drew "from the fact that [he believed] Cities Service was offered, was permitted to purchase a participation in the Consortium." (Deposition of Gerald B. Waldron; Deft's App. 95a-96a).

Plaintiff was wrong on both Kuwait and Consortium, as he and his counsel both know now.

i) ***Kuwait***

Plaintiff entirely mistook the timing and nature of the Kuwait contract and made a hasty and ill-informed guess. The documentary evidence demolishing plaintiff's speculations was overwhelming. It established that Gulf and Cities began negotiating for the purchase by Cities of Kuwait oil as early as *1948,* and that the essential contract terms were buttoned up before Cities even heard of the plaintiff, let alone talked to him.

Discussions began in 1948; price and delivery terms were reached in early 1951; the detailed price formula was

agreed on in early 1952 and a draft of the contract which contained the essential terms embodied in the final contract, was approved by both sides in June, 1952—all before Cities had its first contact with plaintiff.

Ironically, Cities' documents proved that on the very day plaintiff met Cities personnel for the first time, July 8, 1952, the Operating Committee of Cities formally approved the proposed agreement (Exhibits 2-28 in Support of Cities' Motion for Summary Judgment, April 8, 1960; Deft's App. 168a-280a; Affidavit of George H. Hill, Jr. April 8, 1960; Deft's App. 154a-161a).

ii) ***Consortium***

Similarly, plaintiff's allegation—admittedly based upon plaintiff's guess—that Cities was further rewarded by the alleged conspirators by being offered a participation in the Consortium was also destroyed by documentary evidence.

It established that Cities never became a member of the Consortium!

It further established that Cities' *opportunity* to participate was not the result of agreement with other defendants—but was the result of an invitation to participate in the Iranian Oil Consortium extended to the entire oil industry by the United States Department of State.

Cities' application was approved by Price Waterhouse & Company, which was designated by the State Department as a "qualified and disinterested party" to pass upon the qualifications of applicants for a participation. Cities was advised of its acceptability by the State Department. The minuscule percentage allocated to Cities—.45 of 1%—was made after intense dispute among the applicants, and after informal consultation with Mr. Herbert Hoover, Jr., the Under Secretary of State who, in effect, resolved the dis-

pute against the position taken by Cities. The other defendants played no role in this allocation.

Moreover, it is clear that Cities fought unsuccessfully to gain more than a minimal interest in the Consortium, and, failing in that pursuit, elected not to participate at all (Exhibits 29-59 in support of Cities' Motion for Summary Judgment, April 8, 1960, Deft's App. 281a-370a; Affidavit of George H. Hill Jr. April 8, 1960, Deft's App. 161a167a).

On April 8, 1960, Cities moved for summary judgment based on the indisputable documentary evidence which demolished plaintiff's hasty guesses about Kuwait and Consortium.

6. Judge Herland's initial opinion of March 30, 1961

We submit that Judge Herlands should have granted Cities' motion for summary judgment at this point. If he had done so at that time, the past five years of frustrating, time-consuming, expensive litigation could have been avoided. There could be no doubt that on the record and documents submitted at that time, there was no material issue of fact as to Cities, and summary judgment was in order.

Judge Herlands, however, felt constrained by the then narrow construction which decisions in the Second Circuit had placed on Rule 56. Judge Herlands stated:

> "But for the prevailing strict policy in this circuit with respect to the invocation of the summary judgment procedure, the court would have granted the motion. This court has examined virtually every reported summary judgment decision rendered in this circuit since *Arnstein* v. *Porter,* 154 F. 2d 464 (2nd Cir. 1946), over one thousand in number. The rationale and philosophy of *Arnstein* v. *Porter* have not been attenuated by the subsequent course of decisions."

(Opinion, March 30, 1961, Pltf's App. 71a).

The Court observed, however:

> "1. It is doubtful in the extreme whether plaintiff has shown that there is a genuine issue as to any material fact with respect to its claim against the defendant Cities Service Co.
>
> "2. The naming of Cities Service Co. as a defendant herein when the complaint was drawn was based only on suspicion and on a gossamer inference drawn from the mere sequence of events." *

(Opinion, March 30, 1961, Pltf's App. 71a).

Judge Herlands nevertheless adjourned Cities' motion for summary judgment until plaintiff had an opportunity to engage in discovery and related pre-trial proceedings. The Court noted:

> "Because plaintiff's claim against the defendant Cities Service Co. is, judged by the entire available record, so insubstantial, the plaintiff will not be given carte blanche authority to conduct untrammeled pre-trial proceedings. . . . The usual Federal rule permitting fishing expeditions will be curtailed. A just and workable balance will be maintained between the respective interests of the opposing parties."

(Opinion, March 30, 1961, Pltf's App. 72a).

Judge Herlands was more than fair to the plaintiff. Despite the fact that plaintiff's claims were so insubstantial, he refrained from granting summary judgment and afforded plaintiff an opportunity to attempt, through appropriately supervised discovery, to find any material

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* That finding warranted the striking of the attorney's signature to the complaint as against Cities Service. Rule 11, Federal Rules of Civil Procedure.

which could bolster his assertions so as to withstand Cities' summary judgment motion.

Plaintiff was permitted to examine George H. Hill, Jr. of Cities on the only allegations concerning Cities in plaintiff's complaint: "(a) the making of the Agreement dated January 26, 1953, between Cities Service Company and Gulf Oil Corporation, for the sale and processing of Kuwait oil; and (b) the acquisition by Cities Service Company of the opportunity to become a member of the Iranian Oil Consortium." (Order, Herlands, J., May 3, 1961. Pltf's App. 69a). Hill was the Cities employee who had been in charge of both Kuwait and Consortium.

Plaintiff examined Mr. Hill for six days, on October 10, 11, December 17, 27, 1962; January 10 and February 27, 1963. Mr. Hill's testimony demonstrated beyond question that plaintiff's suspicious guesses were simply wrong.

7. Plaintiff Abandons the Kuwait and Consortium Theories

Since the Kuwait and Consortium theories were the sole reasons for plaintiff's joining Cities as a defendant, it is strange that the plaintiff's petition contains scant reference to Cities receiving the Kuwait contract as a bribe or the Consortium opportunity as a reward.

The reason is that plaintiff has abandoned his claim and junked his original complaint, because the Hill deposition and the documentary record had demolished his claim.

Indeed, as to the "Consortium as a reward to Cities" theory, plaintiff conceded below:

> "[I]n fact, Cities watched with resentment when the Iranian pie was ultimately cut up [through the Consortium] by the seven international majors in a manner characterized by Cities as creating a monopoly for

these companies." Affidavit of Samuel M. Lane, September 15, 1964, p. 20; Pltf's App. 146a.

After seven years of litigation, plaintiff accordingly had hit rock bottom. Without a bit of evidence to continue his case, and faced with the overwhelming documentary refutation produced by Cities, plaintiff shed his Kuwait and Consortium speculations and embarked on a different tack designed to frustrate Cities' attempts to end this litigation.

8. Plaintiff Asserts a New Theory: Turnabout—Cities' Alleged Loss of Interest in Iranian Oil

Plaintiff now turned to a new theory explaining Cities' role in the alleged conspiracy as follows:

According to plaintiff, in September 1952, Cities executed a 180° turn and changed its position concerning Iranian oil. This complete turnabout, plaintiff maintains, occurred between the time W. Alton Jones, then president of Cities, went to Iran and the time of his return to the United States. According to plaintiff, when Mr. Jones was in Iran in August 1952 (on invitation of Premier Mossadegh to investigate resuscitating the Iranian oil industry), Cities was deeply interested in Iranian oil. And, says plaintiff, when Mr. Jones reached Paris, in late September 1952, he indicated that Cities was no longer interested in Iranian oil. Plaintiff asserts: although Cities had the entire Iranian oil industry in its grasp, it terminated its relations with the plaintiff and dropped its interest in Iranian oil. From this alleged fact, plaintiff leaped to the conclusion that this "turnabout" evidenced Cities joining the alleged conspiracy.

None of these allegations appeared in the complaint. Nor did the plaintiff have any evidence to support his allegations.

In fact, plaintiff's own contemporaneous behavior makes it clear that in 1952, 1953 and 1954 he drew none of the inferences he asked the courts below to draw from Cities' failure to take over the Iranian oil industry. For throughout the period when Cities' alleged loss of interest took place, plaintiff maintained the most cordial relations with Cities.

Thus, after returning from Iran—after plaintiff was allegedly aware of Cities' alleged loss of interest—he attended a dinner party with Cities officials (Deposition of Gerald B. Waldron; Deft's App. 115a-118a). In March of 1953, plaintiff testified, he and an associate of his, Mr. Nelson, called upon Mr. Watson of Cities, related their business troubles and asked if Cities might compensate them for the time they had spent in connection with the Jones trip to Iran (Deposition of Gerald B. Waldron; Deft's App. 122a-129a).

As to the meeting with Watson, plaintiff testified that he had nothing but the most cordial feelings towards Cities:

> "Q. Did you threaten to sue him? [Mr. Watson]
> "A. No, sir.
> "Q. Did you indicate to him that if he didn't pay you you would take any kind of reprisals against him?
> "A. No, sir.
> "Q. Did any such thing cross your mind?
> "A. No, sir.
> "Q. And when you left the office, you and Nelson felt that it was a rather easy meeting?
> "A. Yes.
> "Q. You were quite pleased?
> "A. Yes."

(*Id.*; Deft's App. 128a).

Nor was this the end of cordial relations between Waldron and Cities. In April of 1953 he and his family had a

very cordial and friendly time with Mr. Lowe of Cities in Denver. (*Id.;* Deft's App. 133a-134a).

Several months later, Waldron came to Cities and asked to be permitted to sell chemicals to Cities (*Id.;* Deft's App. 136a-137a).

Again, in 1954, plaintiff had another "cordial" meeting in New York at Cities' offices where he again offered to sell various products to Cities (*Id.;* Deft's App. 137a-139a).

Mr. Waldron was asked on his deposition:

> "When did the cordiality which you had expressed to Cities Service curdle into hostility?"

(*Id.;* Deft's App. 141a).

Waldron replied that this occurred only:

> "After we heard about the transaction with Gulf [in 1954]." (*Id.;* Deft's App. 141a-142a).

Plaintiff, by his conduct, thus demonstrated that he never dreamed of bringing suit against Cities simply because it failed to take over the Iranian oil industry. He brought suit only when he leaped to his now thoroughly demolished conjecture about the Kuwait contract.

In short, plaintiff now asks this Court to reverse summary judgment by drawing an inference of alleged change of heart, boycott and conspiracy from facts which contemporaneously and *ante litem motam* failed to move plaintiff to the untenable conclusion upon which he now relies.

But, as pointed out below, plaintiff is barred from making this argument. For, in the Courts below, after having spent six days examining Cities on the alleged turnabout, plaintiff *conceded* that there was no change of heart. There was no turnabout. There was no change of position. See pages 28-31, *infra.*

9. Cities' Motion for Summary Judgment, Second Episode: May 13, 1963

Cities renewed its motion on May 13, 1963. At that point, plaintiff had even less to go on than he did when he first filed his complaint. For, although the plaintiff had conducted extensive examination of George H. Hill, Jr. of Cities, he had not advanced beyond the stage he had reached in 1961, when Judge Herlands noted that "the naming of Cities Service Company as a defendant herein when the complaint was drawn was based only on suspicion and on a gossamer inference drawn from the mere sequence of events."

In opposition to Cities' renewed motion, plaintiff could not point to a single specific fact he had gleaned in the three years since Cities' first made its motion which indicated he was entitled to a trial.

10. Plaintiff Amends His Complaint

Nevertheless, plaintiff amended his complaint and dropped his specific allegations concerning Kuwait and the Consortium. In their stead, he substituted a more vague and even less substantial concoction. The new allegations were belied by his own *ante litem motam* contemporaneous conduct. He alleged:

> "Defendants Anglo-Iranian, Socony, Socal, Jersey, Texas and their co-conspirators Gulf and Royal Dutch, with the aid of others, secretly threatened, induced and conspired with defendant Cities Service to break off all dealings with plaintiff and not to proceed further with its demonstrated interest in dealing in Iranian petroleum and products, including the management of certain aspects of the Iranian petroleum industry." (Amended Complaint, June 28, 1963, ¶13(g), p. 19; Pltf's App. 80a).

In place of the two specific allegations in plaintiff's original complaint, plaintiff's counsel substituted a series of hypothetical questions:

> Did Cities Service conspire for some unknown consideration?
>
> Did Cities Service conspire for *no* consideration?
>
> If Cities Service did not join a conspiracy, why did Cities Service "pull out" of Iran? (Stenographer's Minutes, Argument of May 27, 1963, p. 14; Deft's App. 420a-424a). See also Opinion, Herlands, J., June 23, 1964, pp. 40-41; Pltf's App. 56a).

As Judge Herlands noted, in an opinion dated June 23, 1964, "seemingly modifying its earlier accusation that there was a payoff to this defendant, plaintiff restates his position: 'The essential question remains did they conspire. They could conspire for absolutely no consideration'." (Opinion, June 23, 1964; Pltf's App. 56a).

11. Judge Herland's opinion of June 23, 1964

Nevertheless, plaintiff persuaded Judge Herlands not to grant Cities summary judgment, without first providing the plaintiff with every opportunity to discover materials relevant to his assertions which might produce specific facts indicating a genuine issue of material fact:

> "Plaintiff contends that, in order to substantiate its claim that Cities Service was bought off and to flush out evidence as to what constituted the payoff, he must have further discovery.
>
> • • •
>
> "Since plaintiff must—if he is to oppose successfully Cities Service's summary judgment—eventually submit 'specific facts' which 'would be admissible in

evidence' [Rule 56(e)], plaintiff should be given another opportunity to conduct pretrial discovery.

"Plaintiff will be allowed to examine Burl S. Watson [the Chief Executive of Cities], A. P. Frame and J. E. Heston, all of Cities Service Co., in accordance with the order to be settled on June 30, 1964." (Opinion, June 23, 1964, Pltf's App. 56a, 58a).

And so, once again Cities' summary judgment motion was adjourned.

The second discovery order permitted the plaintiff to inquire on the alleged issue of whether Cities' alleged change of position was the result of a conspiracy with other defendants. The discovery order encompassed conversations and communications during the period when, plaintiff alleged, Cities' change of heart occurred—June 11, 1952 through November 1, 1952. The order granted examination concerning communications between Cities and any other defendant pertaining to:

"(a) The two issues defined in the Court's Order filed May 4, 1961; [Kuwait and Consortium]

(b) Conversations and communications, written or oral, from on or about June 11, 1952, to, on or about, October 1, 1952, between defendant Cities Service Company and any other defendant pertaining to:

(1) Waldron, Brown, Nelson, Bentley, Zoes, or Carter;

(2) The refining, marketing, distributing, producing or managing of Iranian oil;

(3) Plaintiff's proposed deal, contract, agreement or other arrangement with the Iranian Government;

(4) *The subject of defendant Cities Service Company's giving up, terminating, dropping or discon-*

tinuing negotiations with the Iranian Government in regard to any of the matters mentioned in item (2) supra; [Emphasis added]

(Order, Herlands, J., July 9, 1964; Pltf's App. 18a-19a). Examination was also ordered concerning internal communications within Cities' organization between June 11, 1952 and November 1, 1952 pertaining to all of these items.

Plaintiff deposed Burl S. Watson on July 27-31, 1964; A. P. Frame on July 23-24; 1964, and J. E. Heston of Cities Service on August 3-4, 1964.

Over 700 pages of transcript were taken and more than 140 documents were marked.

The depositions of Cities Service officials and the contemporaneous writings demonstrated beyond any doubt what Cities has maintained from the beginning of this action—that Cities' interest in Iranian oil continued after September 1952, that Cities did not have any change of heart as the plaintiff alleged, and that Cities continued to search for a solution to the British-Iranian dispute long after Waldron went back to Denver.

Indeed, the documented record destroyed plaintiff's theory that Cities became a conspirator when it had a "change of heart". For plaintiff's basic premise was wrong—the documentary evidence established that Cities never *had* a change of heart!

Thus, the documented record is clear that, immediately after his trip, Jones reported to high State Department officials and engaged in continuing discussions with them, as well as with the Iranian Ambassador to the United States and with the United States Ambassador to Iran (Hill Supplemental Affidavit, May 20, 1960, Exhibits 65, 67, 69, 70, 77 and 80; Deft's App. 371a-374a, 383a, 385a, 388a-391a,

402a, 407a-408a). In addition to corresponding and meeting with these officials, he also wrote to Premier Mossadegh as late as July 10, 1953, conveying his suggestions for solving the vast and complex British-Iranian oil dispute (*Id.*, Exhibit 81; Deft's App. 409a-411a).

In January 1953, after the alleged "change of position", Jones sent copies of a legal opinion which he had obtained from John W. Davis to influential members of the incoming Eisenhower administration—the Secretary of State and the Attorney General. The opinion declared that Iran was correct in its contentions in the dispute over expropriation and that the position which plaintiff ascribes to the alleged conspirators was wrong (*Id.*, Exhibits 72 and 73; Deft's App. 394a-398a). Strange conduct for a co-conspirator to engage in! Nothing could have placed Cities in greater conflict with the alleged conspirators than these activities!

In addition, in November 1952, Jones had Cities furnish Iran with spare parts for the Abadan refinery (*Id.*, Exhibit 66; Deft's App. 384a). In October 1952, he had Cities officials send technical advice to the National Iranian Oil Company to aid them in operating their refinery (*Id.*, Exhibits 60 and 62; Deft's App. 375a, 378a). In November and December 1952, Cities prepared a group of key technical personnel to go to Iran to help in reviving oil production. Plans concerning the lending of such technical personnel were drawn up and transmitted to the Iranian Ambassador to the United States and to Iranian officials abroad in December 1952—again after the alleged "change of position". These efforts continued until July 1953, when Cities Service informed Iran that the United States State Department had refused to approve the project (*Id.*, Exhibits 61, 68, 69, 74, 76, 77, 78, 79 and 80); Deft's App. 376a, 386a-387a, 388a, 399a, 401a-408a).

And there was more. See pages 34-37, *infra*.

But apparently this was convincing enough to plaintiff. "Change of Position" was soon to follow "Kuwait" and "Consortium", into Limbo.

12. Plaintiff Recants Again: The Turnabout or Change of Position Claim—That Cities Lost Interest in Iran After October 1952—Is Not Only Abandoned, But Reversed

Plaintiff completed his examination of Cities and examined the numerous documents produced. Then plaintiff made his most startling reversal in a litigation already covered with the debris of his abandoned contentions: *he asserted that Cities did not change its position, and that Cities did not drop its interest in Iranian oil.*

In his counsel's affidavit, sworn to on September 15, 1964 at page 20, the plaintiff maintains:

> *"It does not happen to be the fact, however, that Cities lost interest in Iranian oil.* Contrary to what plaintiff was told, Jones (President of Cities) continued to take a 'keen interest' in Iranian oil, as Watson, himself, admitted (10823); a special 'Iranian room' was set up at Cities' New York office and put in charge of a young Iranian woman who looked after the files (10883, 10970);" [emphasis added] (Affidavit of Samuel M. Lane, September 15, 1964; Pltf's App. 146a.)

This concession followed the piling up of argument upon argument, and affidavit upon affidavit, in which plaintiff relied on the contention that Cities suddenly and mysteriously abandoned its interest in Iranian oil, and that an inference of conspiracy should be drawn from this "change of attitude", this "180-degree turn".*

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* Plaintiff's repeated contentions on "change of attitude" are quoted and summarized in Affidavit of Edward N. Costikyan, December 4, 1962; Deft's App. 416a-419a and in Stenographer's Minutes, Argument of May 27, 1963, pp. 12-14, Deft's App. 420a-424a.

Plaintiff's agreement that Cities did not lose interest in Iranian oil marked the end of plaintiff's last "gossamer inference." For, when the unfounded premise of Cities' change-of-heart disappeared, there was not even a shadow from which plaintiff could draw a thread of conspiracy.

Change-of-heart, like the Kuwait and consortium speculations, had led to years of fruitless and wasteful litigation. Once again, Cities had been put to the expense and time of accompanying plaintiff on a wild goose chase in search of an hallucinatory conspiracy.

13. Plaintiff's Last Gasp: The Richfield Oil Hallucination

Undaunted by his 0 for 3 batting average, plaintiff's counsel lunged onward to another suspicion.

Plaintiff maintains that he attempted to sell oil to the Richfield Oil Company in the summer of 1953 (Petition, p. 7). Plaintiff neglects to inform the court that these negotiations were conducted after his alleged contract giving him access to Iranian oil had expired.

In any event, plaintiff asserts that Richfield's refusal to purchase oil *may have been* the result of interference by Cities. Plaintiff does not allege that it *was* the result of such interference.

Nor can he. For plaintiff's suspicion as to Richfield is totally unsupported by a single fact.

Mr. Waldron, on his deposition, admitted that at the time he drafted the complaint he had no factual basis whatsoever to make the Richfield charge, nor did he have any factual basis to support that charge at the time of his deposition on October 26, 1959:

> "Q. I am asking you what evidence you have, written or oral, that Cities Service brought about Richfield's decision with respect to Iranian oil.
>
> "A. None as yet."

(Deposition of Gerald B. Waldron; Deft's App. 114a, 97a-98a).

Nevertheless, Judge Herlands permitted the examination of Cities by its officials, Watson, Frame and Heston, on all conversations and communications from June 11, 1953 to September 30, 1953 between Cities and Richfield and any defendant pertaining to the negotiations between plaintiff and Richfield Oil Corporation concerning the purchase of Iranian oil. Similarly, internal communications among Cities Service personnel, concerning the same subject matter, were ordered disclosed.

Again, an empty allegation based on unfounded suspicion and on speculation without the barest factual support, led to an expensive and extensive search for a non-existent cause of action—and not one shred of evidence.

14. Plaintiff's Admissions and Cities Service Documents Demolish the Richfield Conspiracy Suspicion

Plaintiff's claim, without any factual support, is that Cities, in some unspecified manner, pursuant to the alleged conspiracy induced Richfield to stop negotiating with Waldron for Iranian oil in the summer of 1953. It is clear, however, from plaintiff's admissions and from documentary evidence submitted on behalf of Cities below, that Cities was not a conspirator in 1953, or at any time.

As noted, Waldron himself admitted on his deposition on October 26, 1959 that he had no evidence that Cities interfered with the negotiations with Richfield, and had possessed no evidence in this regard at the time his complaint was framed (Deposition of Gerald B. Waldron, Deft's App. 97a-98a, 114a). And, after examining Mr. Watson, Mr. Frame, Mr. Hill and Mr. Heston plaintiff could not point to any evidence whatsoever of any communication between Cities and Richfield or between Cities and

the defendants relating to Waldron's dealings with Richfield. Accordingly, there was not and is not a single evidentiary fact to support the Richfield accusation.

The lack of the specific facts which are needed to defeat summary judgment under Rule 56(e) was not the only fatal weakness in plaintiff's position. In addition, plaintiff failed to cope with his own admissions and the documentary record which together demolished the Richfield contention.

According to plaintiff's original complaint, Cities did not become a conspirator until late August or early September, 1952. And, in plaintiff's reply brief filed on November 4, 1964, in opposition to Cities' motion for summary judgment, plaintiff admitted that the complaint was wrong and that by October 31, 1952 Cities was still not a conspirator. Plaintiff said:

> "Plaintiff does not claim that Jones was acting on behalf of a conspiracy when he sought the invitation [July, 1952] or when he went to Iran [August, 1952], or when he wrote the conclusions to his draft report on October 31, 1952 (Plaintiff's Ex. CS-119)" (Plaintiff's Reply to Cities Service's Submission in Support of its Motion for Summary Judgment, November 4, 1964, p. 12; Deft's App. 460a-461a).

The October 31, 1952 report contained Mr. Jones' conclusion that Cities could not participate in the Iranian oil situation—and that the problem could not be solved—unless the Iranian Government arranged with the British to compensate them for the nationalization of oil properties, because it was not possible to reactivate the Iranian oil industry without British cooperation to insure that tankers would be available to transport Iranian oil, and European markets, which were controlled by the British,

would be available to distribute this oil. See pp. 55-59, *infra.*

According to plaintiff, when Jones reached his crucial conclusion that Cities would not engage in the Iranian Oil dealings without assurances of British tankers and British aid—Cities was *not* acting as a conspirator! ("Plaintiff does not claim that Jones was acting on behalf of a conspiracy . . . when he wrote the conclusion to his draft report on October 31, 1952"; *Ibid.*)

Nor can Cities be tagged as a conspirator at any time after the Jones report of October 31, 1952.

Plaintiff, as noted earlier, reversed his field: no longer did he claim that Cities lost interest in Iranian oil in 1952. On the contrary, he asserted that:

> *"It does not happen to be the fact, however, that Cities lost interest in Iranian oil.* Contrary to what plaintiff was told, *Jones continued to take a 'keen interest' in Iranian oil, as Watson, himself, admitted* (10823) . . ." [Emphasis added] (Affidavit of Samuel M. Lane, September 15, 1964; Pltf's App. 146a).

By plaintiff's own admission, then, Cities maintained its pre-October 31, 1952 nonconspiratorial interest in Iran after October 31, and the documents evidence this continuing nonconspiratorial interest and continuing direct communications with the Iranians through July of 1953, at least—the very time of the Waldron-Riehfield conversations!

But the documentary record goes farther. It establishes that Cities never joined the alleged conspiracy.

Thus, *on February 18, 1954,* Cities personnel conferred with the Under Secretary of State, who was directing American efforts to solve the difficult Iranian situation.

The document reproduced in this Brief at pages 35-36 is within the scope of the order of William B. Herlands, United States District Judge, dated December 13, 1962, "no person shall disclose documents or testimony relating to the Iranian Oil Consortium produced or given by or on behalf of defendant Cities Service Company, or information obtained from such documents or testimony, to any person other than the parties, their counsel, the Court or representatives of the Executive Branch of the United States Government until twenty days after notice of intent to disclose said documents, testimony or information shall have been served upon the United States Attorney for the Southern District of New York and upon counsel for the parties herein."

The contents of this document accordingly may not be disclosed to any persons other than the parties, their counsel, the Court, or representatives of the Executive Branch of the United States Government. All other persons seeking disclosure of the contents of this document must comply with the procedural provisions outlined in Judge Herlands' order.

um would foster monopoly and exclude the independent oil companies and "have-nots" from Iranian oil development!

The plaintiff relied upon this very memorandum in opposing Cities' summary judgment motion and in his counsel's affidavit, stated:

> "In fact, Cities watched with resentment when the Iranian pie was ultimately cut up by the seven international majors in a manner characterized by Cities as creating a monopoly for these companies (Pltf's Ex. CS-40)." (Affidavit of Samuel M. Lane, September 15, 1964; Pltf's App. 146a).

Cities' complaints about the proposed Consortium plan and the role of the independents continued until the spring of 1955, when Cities declined to join the Consortium because the participation offered to it was so miniscule.

In light of the documentary evidence and plaintiff's own admissions, his contention that Cities induced Richfield not to deal with plaintiff in the summer of 1953, thereby joining the other defendants in a conspiracy to frustrate his efforts to market Iranian oil becomes absurd. Plaintiff must assert the incredible hypothesis that although Cities was a nonconspirator throughout the period in question, it nevertheless joined the alleged conspiracy for an instant of time in order to prevent Richfield from purchasing oil from plaintiff.

It is incredible that, in the course of Cities' admittedly single, uniform, consistent nonconspiratorial pattern of conduct, Cities, pursuant to and as part of the alleged conspiracy it opposed, quietly engaged in a little coercion on Richfield Oil to prevent Richfield from purchasing Iranian petroleum from plaintiff under an expired contract. This

wild speculation is unsupported by any evidence and is rebutted by all of the available evidence.

Faced with these indisputable facts, plaintiff's claim defies rational definition.

15. Cities' Motion for Summary Judgment, Third Episode: October 16, 1964

Cities renewed its motion for the third time in October, 1964. The motion was argued for the third time in February, 1965. The decision was rendered in September, 1965.

The incontrovertible facts established by the documentary record having demolished plaintiff's speculations nine and a half years after his litigation against Cities Service was begun, plaintiff's case against Cities Service was dismissed. Judge Herlands, who had lived with the *Waldron* case for six years* and had seen each of the plaintiff's fanciful speculations demolished, finally granted Cities, motion for summary judgment.

In his opinion Judge Herlands noted that Federal Rule 56(e) had been amended since the case had begun, to overcome the restrictive judicial interpretation placed on the summary judgment rule in the Second and other circuits. The 1963 amendments to the Federal Rules require specific facts or evidentiary data to be presented by a party opposing summary judgment. Judge Herlands had given the plaintiff broad opportunities to discover the specific facts which he would have to submit in order successfully to oppose Cities' overwhelming demonstration that it was entitled to summary judgment.

Judge Herlands, in granting Cities' motion, stated:

> "The single issue before the court relating to Cities' motion for summary judgment, is whether plaintiff's

* The case had been referred to Judge Herlands for all purposes on May 1, 1959.

discovery has unearthed a 'genuine issue [of fact] for trial' where nothing had existed before but 'suspicion' and 'gossamer inference drawn from the mere sequence of events.'"

(Opinion, September 8, 1965; Pltf's App. 10a-11a.)

Summarizing plaintiff's position, Judge Herlands noted that plaintiff relied on the sequence of events, claiming that an alleged "change of heart and mind" of Cities showed that Cities had joined the alleged conspiracy.

Judge Herlands summarized the results of plaintiff's exhaustive examination of every living person who had accompanied Cities' President Jones to Iran in August 1952, and all those who would be able to link Jones' activities at that time with the alleged conspiracy as follows:

"The examinations of Watson, Frame and Heston have not produced any evidence from which a trier of fact would be permitted to infer that the Kuwait oil contract and participation by Cities in the consortium were consideration for Cities allegedly dropping its interest in Iranian oil and joining the alleged conspiracy against plaintiff. On the contrary, *the record, as it now stands, conclusively establishes that both the Kuwait contract and participation in the consortium had no connection whatever with the course of Cities' conduct with regard to Iranian oil.*" (*Id.;* Pltf's App. 11a-12a) (emphasis added).

Judge Herlands then dealt with the heart of plaintiff's revised complaint:

"Plaintiff's major premise throughout this litigation with regard to Cities has been that, for some reason, Cities did a complete turnabout with respect to its interest in Iranian oil. *Not only has the evidence*

thus far adduced demonstrated that the alleged turnabout was not motivated for the reasons originally advanced by plaintiff [Kuwait and consortium] *but the evidence has brought into serious doubt the existence of the major premise itself—a turnabout or change in attitude. Rather, the evidence persuasively demonstrates a consistent course of conduct by Cities with regard to Iranian oil at all times."* (*Id.*, Pltf's App. 12a) (emphasis added).

(Judge Herlands apparently overlooked plaintiff's concession that there had been no turnabout, discussed at pp. 30-31, *supra*.)

Judge Herlands was explicit on what elements were missing from plaintiff's position:

"The crucial facts which plaintiff must produce in order to survive Cities' motion for summary judgment are evidentiary data tending to prove that Cities became a party to the alleged conspiracy. *These evidentiary data have not been forthcoming. Even the 'gossamer inference' that existed in 1961 has become attenuated into nothingness as a result of the pretrial record developed during the last four years.*

"Plaintiff has been permitted to examine all of those persons still living, who accompanied Jones to Iran in August, 1952 and who would be able to link Jones' activities at that time with the alleged conspiracy.

"The examinations, however, have done no such thing." (*Id.*, Pltf's App. 12a-13a) (emphasis added).

The Second Circuit affirmed Judge Herlands' decision unanimously, and pointed out that plaintiff had "advanced several divergent theories of his case by which he sought to link Cities Service to the alleged conspiracy." The Court

also noted that petitioner had been granted extensive discovery on three different occasions and on each of the theories which he had asserted. Finally, the Court found that "The record is barren of any facts which would support the existence of a claim against Cities Service," and concluded:

> "Despite these more than ample opportunities to develop a basis for his action, plaintiff has been unable to do so, and has failed to demonstrate the existence of any genuine issue of fact. The court quite properly denied the Rule 56(f) motion for further discovery by which plaintiff sought to engage in still another 'fishing expedition' in the hope that he could come up with some tenable cause of action." (Petition, p. 39; 361 F. 2d at 673.)

Summary of Argument

Respondent Cities Service Co. contends that the courts below properly found that it had demonstrated that there was no genuine issue of fact to be tried in this case. This decision was based on hundreds of pages of documents and affidavits submitted by Cities, petitioner's deposition, petitioner's concessions and admissions in the lower courts, and the undisputed record. In view of Cities' demonstration, the lower courts looked to petitioner to produce evidentiary data to support any claim against Cities or to refute Cities' overwhelming documentation. Petitioner totally failed to do so, even after extensive discovery, and the courts below then correctly granted summary judgment for Cities. Nothing in the petition for a writ of certiorari challenges or refutes Cities' demonstration, and there is no genuine factual issue remaining in the case. (Point I, *infra.*)

Respondent also contends that in addition to lacking substantive merit, petitioner's main argument is also proce-

durally defective. Petitioner never previously raised the contention he makes here—that the District Court and the Court of Appeals relieved Cities Service of the burden of demonstrating that there was no genuine issue of fact and imposed the converse burden on petitioner. The lower courts never addressed themselves to this issue since it was never presented below by petitioner, and he should not be permitted to raise that issue here for the first time. (Point II, *infra.*)

Finally, respondent contends that the district court did not abuse its discretion in denying petitioner further discovery after he had extensively examined Cities on every claim he had asserted at any time. Cities had conclusively demonstrated that there was no issue of fact to be tried, and petitioner failed to produce any evidentiary data supporting his assertions after nine and one-half years of litigation. Indeed, the district court stated that it was "convinced to a legal certainty" that petitioner had no case whatsoever against the respondent. The denial of further discovery was entirely proper, and the Court of Appeals correctly affirmed. (Point III, *infra.*)

POINT I

Nothing in the Petition for a Writ of Certiorari refutes Cities' demonstration or the decisions below that there is no genuine issue of fact to be tried.

Plaintiff's petition has little to do with the facts in the case at bar. Indeed, only four pages of the petition attempt to set out any specific facts in order to show that summary judgment should not have been granted to Cities. (Petition, pp. 4-7.) It is to that section of the petition which we now turn.

Assuming every one of petitioner's assertions there found to be true, with the exception of the assertions which are demonstrably false, there still remains no triable issue, and the courts below were clearly correct in granting Cities' summary judgment.

a) *The Demonstrably False Assertion*

The demonstrably false assertion is the repeated statement ascribing to Mr. Jan Sandberg some position with the Royal Dutch Shell Company, an alleged co-conspirator, and petitioner's conclusion that the conference between Alton Jones (Chairman of Cities' Board) and Sandberg on Jones' way to Iran in August 1952 is a crucial indicator that Cities was part of the alleged conspiracy:

> "On the way to Iran, Jones stopped at The Hague where he conferred for five days with Jan Sandberg. According to Watson, Sandberg was a member of the finance committee of Royal Dutch/Shell, a major international oil company, named in the amended complaint as one of the co-conspirators. No member of the Jones party participated in these conferences, and no memorandum has been disclosed to plaintiff." (Petition, pp. 5-6.)

> "Cities, although anxious at first to accept the deal offered it by him [petitioner], made a sudden turnabout after conferring with several of the other alleged conspirators. . . ." (Petition, p. 31.)

This assertion is repeatedly made and heavily relied upon by petitioner. (Petition, pp. 5-6, 18, 22, 30, 31.)

The assertion is demonstrably false.

Petitioner's assertions as to Sandberg are so improper and incorrect that the references in the petition would be an attempt to deceive this Court if it were not the product of gross ignorance of the record.

The Sandberg issue was thoroughly demolished below. The facts are these.

During the deposition of Mr. Burl S. Watson, then the Chief Executive Officer of Cities, plaintiff's counsel, Mr. Beshar, told Mr. Watson and defense counsel *off the record* that he had done research and discovered that Sandberg was a member of the finance committee of Royal Dutch Shell. This colloquy took place at the start of the morning session of the Watson deposition on Thursday, July 30, 1964. Thereafter, shortly after the morning session began, Mr. Beshar asked Mr. Watson the question:

> "Were you aware at the time that Mr. Sandberg was a member of the Finance Committee of Royal Dutch Shell?"

Watson's answer was, "I do not know when I became familiar with his position in Royal Dutch Shell. I know now that he has such a position or that he has had it in recent years. I cannot remember whether I knew it back in 1952 or not" (Deft's App. 425a).

But it is clear that when Watson answered Beshar's question, he was merely accepting Beshar's word as to the role of Sandberg. This is confirmed by the record of Friday, July 31, 1964, where Beshar stated:

> "*I*, through some research discovered the night before last (Wednesday) that Sandberg was a member of the Finance Committee of Royal Dutch Shell." [emphasis supplied] (Deft's App. 426a).

Beshar was completely and totally misinformed, and the record is incontrovertible in this regard. In the affidavit of Simon H. Rifkind of October 16, 1964, it was noted that:

> "I am informed and believe that, in response to inquiries to the "Royal Dutch Shell" group in New York as to Mr. Sandberg's alleged relationship to those companies, Cities Service was advised that he had no such relationship at any time; and specific inquiry to Mr. Sandberg's secretary, who has been with him for many years, as to whether Mr. Sandberg had ever held any position with Royal Dutch Shell and specifically as to whether he had been an officer, director, member of the Board or on its Financial Committee during the period 1952 through 1954, resulted in a reply, copy of which is annexed hereto as Exhibit A, stating that Mr. Sandberg has never had any such position, and specifically, that he was not an officer, director, member of the Board or Financial Committee in 1952, 1953 or 1954. In addition, I was also informed and believe a search made by Mr. Connolly and Mr. MacMurray, of the Central Inquiry Office of Standard and Poor's, has revealed that the annual reports of Royal Dutch Petroleum Company and Shell Transport and Trading Company, Ltd. do not list Mr. Sandberg as having had any position or connection

with these companies in the years 1952, 1953, 1954 or 1964." (Affidavit of Simon H. Rifkind, October 16, 1964, Deft's App. 451a).

An affidavit from Mr. Sandberg himself, sworn to on October 26, 1964 in Holland, and served on November 4, 1964 stated point-blank:

> "I am not now nor have I ever been a director, officer or member of any corporate committee, or employee of the Royal Dutch Petroleum Company or The Shell Transport and Trading Company or of any of their subsidiaries or affiliates." (Affidavit of Jan A. G. Sandberg, October 26, 1964; Deft's App. 459a).

This is not the only indication that petitioner was totally in error in first making his assertion, and is now acting either in total ignorance or in bad faith in raising the issue once more in his petition. In their brief of November 4, 1964, in opposition to Cities' summary judgment motion, plaintiff's attorneys stated:

> *"We do not understand how we could have been so misinformed about Sandberg's connection with the Royal Dutch Shell Group.* Obviously we cannot be expected to answer on November 4, 1964 an affidavit served on us on November 4, 1964 concerning a gentleman in Amsterdam, but we intend to look into the matter." (Emphasis added) (Plaintiff's Reply to Cities Service's Submission in Support of its Motion for Summary Judgment, November 4, 1964, p. 22; Deft's App. 461a).

The summary judgment motion was not argued until February 9, 1965. Whatever the results of petitioner's research, his counsel never uttered a further word to suggest

that anything Cities or Mr. Sandberg said concerning Mr. Sandberg's non-existent connection with Royal Dutch Shell was incorrect. Petitioner, here, as in every other instance in this case, has utterly failed to sustain his burden of coming forward with specific facts to defeat Cities summary judgment motion. Since the facts as to the identity of the Board of Directors, officers and Finance Committee of Royal Dutch Shell and its subsidiaries are a matter of public record, the facts, if they existed, were available to petitioner.

His failure to supply them, and his abandonment of this point on the final argument below, bars assertion of this alleged fact here.

In fact, there was no connection whatsoever between Sandberg and Royal Dutch Shell and petitioner knows it. This is a perfect example of a spurious and sham issue which petitioner attempted to create below and now tries to revive in his petition.

Petitioner's counsel told Watson of Cities that Sandberg was part of Shell. Unfortunately, Watson accepted petitioner's counsel's word, although counsel was just simply wrong. Then petitioner relies upon what Watson said based upon this misinformation. Petitioner ignores the indisputable record, Sandberg's affidavit, and his own failure to produce any evidence, and re-asserts the whole bogus issue again in his petition.

Finally, petitioner does not mention his own concession; he admits that Cities was not a co-conspirator *in August 1952 when the the Jones-Sandberg conversations took place.*

> "Plaintiff does not claim that Jones was acting on behalf of a conspiracy when he sought the invitation, or when he went to Iran, [August 1952] or when he held his Tehran press conference, [September 1952] or when he wrote the conclusions to

his draft report on October 31, 1952." (Plaintiff's Reply to Cities Service's Submission in Support of its Motion for Summary Judgment, November 4, 1964, p. 12; Deft's App. 460a-461a.)

We submit that in raising the Sandberg issue again here, petitioner has gone beyond the pale of proper advocacy.

b) *No "Rational Inference" of Conspiracy by Cities Can be Drawn on This Record*

The courts below rejected petitioner's request that they draw a "rational inference" that Cities joined with the alleged conspirators when it "turned down this opportunity [to take over the Iranian oil industry] without explanation [to plaintiff.]"

Petitioner repeats his plea here:

> "Cities went three-fourths of the way towards exploiting the opportunity but then, after conferring with several of the co-conspirators, stopped in its tracks. . . . Cities' action, taken in apparent contravention of its immediate self-interest in the premises, paralleled and aided that of the other conspirators, who were engaged in an open campaign to boycott all suppliers of Iranian oil. . . ." (Petition, p. 22.)

At pages 4 through 7 of his petition, petitioner attempts to create a framework to justify the inference he seeks.

These assertions, however, cannot lead to an inference of conspiracy. All of these assertions appear to be no more than a prelude to the now abandoned claim of turnabout. But in the absence of a turnabout, and in the face of the documented record of a single, consistent, undeviating, ad-

mittedly non-conspirator's course of conduct, they are a prelude to nothing.

Thus, when Cities was allegedly at the mercy of the International oil suppliers (Petition, p. 4), petitioner admits Cities was not a conspirator.

When Cities attempted to obtain foreign crude oil for many years (Petition, p. 4), petitioner admits Cities was not a conspirator.

When conferences were held between petitioner's associates and Cities in June, 1952 (Petition, p. 4), petitioner admits Cities was not a conspirator.

When Cities expressed interest in taking over the Iranian oil industry (Petition, p. 4), petitioner admits that Cities was not a conspirator.

When petitioner went to Iran to obtain an invitation that Cities desired and when he delivered the invitation to Cities on July 31, 1952 (Petition, pp. 4-5), petitioner admits that Cities was not a conspirator.

When Watson prepared his memorandum in August, 1952 (Petition, p. 5), petitioner admits Cities was not a conspirator.

When Jones went to Iran, conferred with Sandberg, allegedly a member of the finance committee of a co-conspirator (a wholly false allegation as pointed out above) and sought information on tankers from Watson (Petition, pp. 5-6), petitioner admits Cities was not a conspirator.

When Jones inspected Iranian facilities (Petition, p. 6), petitioner admits Cities was not a conspirator.

When petitioner returned to the United States in September, 1952, and was told what petitioner testified he was told:

> "In view of Mr. Watson's statements and the general situation we realized that the—we felt that the thing was in *abeyance*. Mr Watson said on several occasions they were not interested *now*. Mr. Whetsel kept telling us the situation might open up." [emphasis added]
>
> (Deposition of Gerald B. Waldron, Deft's App. 118a Cf. Petition, p. 7: "A few days later Waldron was informed by Watson that Cities had no interest in Iranian oil.")

petitioner admits Cities was not a conspirator.

When the communications concerning the proposed sale of Iranian aviation gasoline to the United States Air Force took place in September, 1952 (Petition, pp. 6-7), petitioner admits Cities was not a conspirator.

At the end of October, 1952, when Jones wrote his final report and Cities decided not to take over the Iranian oil industry, if it ever had the chance (Petition, p. 6), petitioner admits Cities was not a conspirator.

Indeed, every alleged fact set forth at pages 4 through 7 of the petition took place at a time when petitioner admits Cities was not a conspirator.

Finally, as to the Richfield transaction, discussed at page 7 of petitioner's brief, that unsupported speculation has already been disposed of. (See *supra*, pages 31-38.)

Accordingly it is of no moment whether Cities explained to petitioner why it did not take over the Iranian oil industry. Or whether Cities solicited Iran's invitation. Or what Jones communicated with what motivations concerning the sale of aviation gasoline in September, 1952. Indeed, the same is true concerning Cities' alleged refusal to deal with petitioner in September of 1952. Whatever the motive,

petitioner has conceded that at the time of all of these events, Cities was *not* a conspirator. And the only possible issue in this case is whether any of this conduct was pursuant to the alleged conspiracy. Petitioner has conceded it was not.

These concessions were not casually given. Petitioner conceded:

> "Plaintiff does not claim that Jones was acting on behalf of a conspiracy when he sought the invitation, [July 1952] or when he went to Iran, [August 1952] or when he held his Tehran press conference, [September 1952] or when he wrote the conclusions to his draft report on October 31, 1952." (Plaintiff's Reply to Cities Service's Submission in Support of its motion for Summary Judgment, November 4, 1964, p. 12; Deft's App. 460a-461a.)

And further, plaintiff boldly asserted:

> *"It does not happen to be the fact, however, that Cities lost interest in Iranian oil.* Contrary to what plaintiff was told, Jones (President of Cities) continued to take a 'keen interest' in Iranian oil, as Watson, himself, admitted; a special 'Iranian room' was set up at Cities' New York office and put in charge of a young Iranian woman who looked after the files and, in fact, Cities watched with resentment when the Iranian pie was ultimately cut up by the seven international majors in a manner characterized by Cities as creating a monopoly for these companies (Pltf's Ex. CS-40)." (Affidavit of Samuel M. Lane, September 15, 1964; Pltf's App. 146a).

These admissions were compelled by the documentary record which plaintiff, in his petition, blithely disregards.

On this record, petitioner's argument that

> "Cities, although anxious at first to accept the deal offered it by him, made a sudden turnabout after conferring with several of the other alleged conspirators, and thereafter, in contravention of its own interests in the matter, and in obedience to the announced conspiratorial purpose, not only turned plaintiff down but used its influence to frustrate plaintiff's attempt to dispose of some of his oil to the United States government" (Petition, p. 31)

creates no triable issue, for petitioner has conceded that Cities did *not* lose interest in Iranian oil. He abandoned below his contention that Cities made any turnabout at all. The Sandberg conference referred to has been shown above (pp. 43-48) to be wholly false. Finally, petitioner has conceded that when Watson conferred with Sandberg, when Cities turned down his proposal, and when Cities allegedly tried to stop his attempted sale of Iranian aviation gasoline to the United States Government in September of 1952—that at all these times Cities was not a conspirator.

In fact, plaintiff concedes that as late as 1955 Cities "watched with resentment" while the alleged conspirators carved up the "Iranian pie," excluding Cities Service therefrom.

The documented record and petitioner's concessions which were compelled thereby establish that Cities pursued a single, unified, anti-conspiratorial, anti-monopoly course of conduct from 1952 to 1955. On this record, summary judgment was clearly proper.

c) *What is Left of Petitioner's Case?*

Petitioner's case against Cities really boils down to a question. Petitioner asked below: "Why, after going so far [had] Cities turned aside?"

Petitioner repeats his query here:

> "Cities went three-fourths of the way to exploiting the opportunity but then . . . stopped in its tracks . . . in apparent contravention of its immediate self-interest. . . ." (Petition, p. 22.)

The history of this litigation has moved from the plaintiff's *allegations* in his complaints, to plaintiff's admission on his deposition that his case was based on two *conjectures*, to the present stage, where all his conjectures have been totally destroyed, and the plaintiff is driven to state his case in the form of a series of *speculative inquiries*. In short, after 9½ years nothing remains of plaintiff's case against Cities except an inquiry: Why did Cities Service fail to take over the Iranian Oil Industry?

But even the answer to this speculative inquiry is found in the documented record. On October 31, 1952, Mr. Jones completed a proposed report to Premier Mossadegh outlining the problems and the proposed solutions relating to reactivating the Iranian oil industry.

Assuming, although it has not been proved, that Cities had the opportunity to take over the entire Iranian oil industry, as petitioner asserts, the reasons why it did not do so are clearly set forth—in a contemporaneous document, whose authenticity is unchallenged, prepared at a time when plaintiff *admits* Cities was not a conspirator.

That document states *inter alia:*

> "MAINTENANCE AND REPAIR MATERIAL
>
> * * * *
>
> The problem of securing replacement and repair parts for this British-manufactured equipment from other than the British manufacturer is almost impossible of solution. An investigation has been made

as to the possibilities of obtaining spare parts for the British-manufactured equipment from American manufacturers. The specific parts investigated were those included in lists obtained from Abadan during the visit to Iran. This study has shown conclusively that in the great majority of cases it would be practically impossible for American manufacturers to supply such equipment due to lack of detailed fabrication drawings, as well as to the fact that the fabricating of small quantities of special orders becomes prohibitively expensive."

(Report on Iranian Petroleum Situation, October 31, 1952, p. 7; Deft's App. 6a-7a).

"It is extremely doubtful if the Abadan refinery could operate at maximum capacity, or even close thereto, for more than a very few months unless a workable mechanism is devised for the securing of repair and replacement parts for the British-manufactured refinery equipment."

(*Id.* p. 8; Deft's App. 8a).

"*Automotive Facilities*

The problem of maintaining adequate automotive transportation facilities is one of the most serious problems facing the National Iranian Oil Company at present. This is true, first, because all petroleum operations are dependent upon automotive facilities for the movement of men and materials, and secondly, even with the limited scale of today's operations, the automotive transportation facilities are being operated almost at their original capacity since the number of employees of N.I.O.C. is but little changed from what it was prior to nationalization. Since early in 1951 no

new automotive equipment has been obtained by the N.I.O.C. and only a very limited amount of repair parts for the existing equipment. It was quite apparent from an observation of the various types of automotive equipment now in use that unless extensive replacements are soon secured there will be a serious collapse in the automotive transportation system." (*Id.* p. 17; R. 12200; Deft's App. 17a).

* * *

"There are three major considerations to be resolved if the petroleum industry in Iran is to be reactivated:

First, obtaining sufficient tankers, markets and marketing facilities to secure outlets for Iranian petroleum products and crude oil.

Second, obtaining necessary skilled petroleum technologists and operators to supplement the present Iranian staff for the operation of the petroleum facilities.

Third, obtaining the necessary replacement and repair material to permit the operation of the existing petroleum equipment, a large proportion of which is of British manufacture.

It is proposed to discuss the first consideration in some detail in this summary section since it is the most difficult of solution." (*Id.* p. 25; Deft's App. 25a).

* * *

"The possibility of exporting any substantial quantity of petroleum products from Iran to the Western Hemisphere in the foreseeable future would appear to be almost negligible. This is particularly true because the Abadan refinery in contradistinction to Iranian oil production is not a low-cost producer.

The labor costs at the Abadan refinery, despite comparatively low wage rates, are from five to seven times greater than for comparable U. S. refineries, and the yield of high value products, such as gasoline, is much lower than invariably obtained by U. S. refineries. It would seem to be completely unrealistic to assume that any reactivation of the Iranian refining industry could be achieved in the foreseeable future through the exportation of refined products from Abadan to the Western Hemisphere." (*Id.* at p. 28; Deft's App. 28a.)

"A correlary part of securing outlets for Iranian petroleum is the problem of securing sufficient tankers for the movement of this oil. It is estimated that to move as much oil from Iran as was moved in 1950 to Eastern Hemisphere markets would require about 400 tankers, aggregating about 5,000,000 deadweight tons. Table II in the appendix shows the latest available listing of the worldwide tankage fleet by countries and by tonnage. As of the present time practically all these tankers are in operation and it is probable that this tight tanker situation will continue for the next two years. While it is true that a certain number of tankers can almost always be obtained on a charter basis, it is highly improbable that anything like 5,000,000 tons of tanker capacity could be obtained to move Iranian petroleum without drawing on at least part of the fleet which, prior to nationalization, moved Iranian oil into world markets [the Anglo-Iranian fleet]. The construction of a new fleet of tankers for this purpose is possible, but it would be exceedingly expensive (possibly $800,000,000) and would require as much as five years to complete.

"Summarizing, the follwing reflects the views of Mr. Jones and his associates on this phase of the report:

1. Complete reactivation of the Iranian petroleum industry in any reasonably short time will require that some arrangements be consummated through which a substantial portion of the marketing and transportation facilties utilized for Iranian oil prior to nationalization [both British] will be restored to this service.

2. There will be little, if any, demand in the Western Hemisphere for refined products from Abadan.

3. For the immediate foreseeable future, Abadan refinery operations cannot be increased beyond the amount needed to take care of internal Iranian demands and such markets as can be developed in Europe, Asia and Africa." (*Id.* at pp. 29-30; Deft's App. 29a-30a.)

* * *

"This fact must be recognized by all parties concerned; that the full reactivation of the Iranian oil industry within a period of five years or less can only be obtained by the consummation of some agreement between the Iranians and the British whereby the markets and the transportation and marketing facilities previously being served by and handling Iranian petroleum are returned to that service. Therefore, the development of a mutually satisfactory agreement between the Iranians and the British is the fundamental point governing the full reactivation of the oil industry of Iran." (*Id.* at p. 35; Deft's App. 35a-36a).

It is conceded that the idea of such an agreement would not then even be entertained by the Iranians.

If petitioner were not so obsessed with his search for the slightest evidence of evil-doing by Cities, he would accept this admittedly non-conspiratorial summary for what it

was—an honest answer to his persistent question "Why, oh why, didn't Cities do it?"

Petitioner has thus not produced any specific facts showing that there is a genuine issue for trial. Instead, he has relied upon a speculative inquiry, in the absence of any evidence substantiating any of his previously demolished guesses. He asks "did Cities conspire"?—the ultimate conclusory question—in the face of an undisputed record which compels the conclusion that Cities never engaged in the conspiracy petitioner alleges.

In any event, merely raising questions as to legal conclusions is totally insufficient to defeat a motion for summary judgment. There can be no doubt concerning the meaning of Rule 56(e) which states:

> "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegation or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate shall be entered against him."

POINT II

Petitioner may not now raise for the first time the argument that the lower courts somehow shifted to petitioner the burden of demonstrating the existence of a genuine issue of fact.

Petitioner's main argument here is that both the District Court and the Court of Appeals misapplied the summary judgment procedures under Rule 56 of the Federal Rules of Civil Procedure by "relieving the defendant of the burden of demonstrating the absence of a genuine issue of fact on its motion for summary judgment, and imposing the converse burden on plaintiff." (Point I, Petition, p. 13.)

This argument suffers from two defects. First, petitioner has never raised this argument in the 9½ years during which this litigation has been pending, and inserts it in his petition here as an afterthought. Second, as we have urged above (pp. 3-8 and Point I), even if properly before this Court, petitioner's argument is totally without merit and ignores both the opinions and the voluminous record below.

It is well settled that this Court will not consider points raised in petitions for certiorari which have not been raised before or considered by the court below:

> "Rule 23(1)(c) [of the Supreme Court Rules] states that the Court limits the petitioner to the points raised in his petition. These points must, of course, properly arise in the record and *must have been urged and briefed below*" (Citations omitted). Stern & Gressman, Supreme Court Practice, p. 248 (3d Ed., 1962).

For example, in *Lawn* v. *United States,* 355 U. S. 339, 362 n. 16 (1958), when petitioners contended that the trial

court had erred in refusing a motion for production of certain documents, this Court concluded:

> "This issue was not raised in the Court of Appeals. Only in exceptional cases will this Court review questions not raised in the court below. *Duignan* v. *United States,* 274 U. S. 195, 200; *Husty* v. *United States,* 282 U. S. 694, 701, 702. There are no exceptional circumstances here."

See also *California* v. *Taylor,* 353 U. S. 553, 557, n. 2 (1957).

Plaintiff's did not raise the "shifting of burden" issue in the Court of Appeals. This is clearly indicated by merely listing the three points contained in his brief before the Second Circuit: Point I—"Appellant Has Set Forth Specific Facts Showing Genuine Issues of Material Facts"; Point II—"Rule 56(e) and Recent Cases Decided Thereunder Do Not Authorize Summary Judgment in this Action"; Point III—"Further Discovery Under Rule 56(f) Should Be Granted".

None of the briefs filed by the petitioner at any time below raised the argument that Cities had been relieved of demonstrating that there was no genuine issue of fact when it moved for summary judgment.

It is apparent that neither the District Court nor the Court of Appeals could have decided, nor did decide, that Cities did not have to show that there were no genuine issues for trial on its summary judgment motion. Indeed, the courts below had no occasion to address themselves to or pass upon this issue because it was never presented by plaintiff.

We submit that plaintiff's claim that the Court of Appeals ruled on this point is erroneous, that plaintiff did

not raise this argument at any time below, and that he should not be permitted to assert it for the first time in his petition here.

POINT III

The District Court did not abuse its discretion and the Court of Appeals was correct in affirming the denial of further discovery to petitioner.

In light of the indisputable record, the suggestions that discovery of Cities was too restricted (Petition, pp. 9-12, 19-21), and that discovery of other defendants was improperly denied (*id.*, p. 21) are out of place.

Plaintiff examined every surviving Cities Service employee who had anything to do with him, or Iran, or Kuwait, or Consortium, or "change of position" or Richfield. In view of the breadth of these depositions and plaintiff's utter failure to produce any facts supporting his case after 9½ years, his makeweight arguments as to the scope of discovery appear cavilling, and they were all properly rejected below.

Plaintiff contended below that without any specific claim or facts to support his claim "plaintiff has a right to determine whether Cities Service did conspire". (Pltf's Memorandum of Law in Support of Plaintiff's Motion for Further Discovery, November 4, 1964, p. 20.) His argument here as to additional Rule 56(f) discovery of Cities and other defendants, is based upon the theory that he is entitled to such discovery as a matter of right.

But, it is clear that further discovery was a question of discretion under Rule 56(f). And plaintiff makes no effort to show that Judge Herlands' denial of further discovery was an abuse of discretion.

Rule 56(f) provides:

> "Should it appear from the affidavits of a party opposing the motion [for summary judgment] that he cannot for reasons stated present by affidavits facts essential to justify his opposition, the court *may* refuse the application for judgment or *may* order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or *may* make such other order as is just." (Emphasis supplied)

The law is clear that when the record presented warrants summary judgment, and no specific facts have been produced by the opposing party, it is within the discretion of the trial judge under Rule 56(f) to grant summary judgment, or to adjourn the motion pending further discovery. 3 Barron & Holtzoff, Federal Practice and Procedure, § 1238, p. 174 states:

> "To obtain relief under this provision, however, the opposing party must show good reasons why he cannot present facts essential to justify his opposition."

Professor Moore, summarizing the case law, states:

> "Exercising a sound discretion [under Rule 56(f)] the trial court then determines whether the stated reasons are adequate. And, absent abuse of discretion, the trial court's determination will not be interfered with by the appellate court." 6 *Moore's Federal Practice* ¶¶56.24, 56.15 [6] pp. 2873-2874; 2429 (2d ed. 1965); See also, *e. g., Bond Distributing Co.* v. *Carling Brewing Co.*, 32 F. R. D. 409, 414-415 (D. Md. 1963), *aff'd* 325 F. 2d 158, 159 (4th Cir.).

Plaintiff cannot maintain that Judge Herlands abused his discretion in denying further discovery to the plaintiff,

when, after 5 years of discovery, plaintiff did not produce a single specific fact to indicate a genuine issue for trial.

As pointed out above (pp. 19-21, 26-28, 32), Judge Herlands gave plaintiff opportunity after opportunity to discover specific facts or evidentiary data which would enable him to defeat summary judgment. Judge Herlands' patience and fairness in this regard are thoroughly documented in the record.

As pointed out above (pp. 21, 28-30) after pursuing Cities' officials through 1200 pages of transcript, and inspecting over 220 Cities' documents, plaintiff was still unable to present any specific facts bearing on his speculations concerning Cities.

As pointed out above (pp. 21-22, 25-26, 30-34), plaintiff abandoned his contentions one by one and admitted that Cities never lost interest in Iranian oil and that Cities fought the proposed consortium on the ground that it fostered monopoly.

And, there is nothing left of plaintiff's case as to which further discovery of Cities or of the other defendants could be relevant. Plaintiff now asks only: Did Cities conspire?—a conclusory question that is not a specific fact or evidentiary datum, nor even a claim.

The history of this litigation reveals that plaintiff's discovery has not narrowed the issues at all. For the *more* discovery and examination of witnesses plaintiff conducts, the *less* specific his claim against Cities becomes.

His most specific allegations are in his complaint, that the Kuwait oil contract was a bribe and the Consortium opportunity was a reward. They have evaporated as plaintiff examined Cities officials and documents.

The vaguer claim that followed—that Cities unexplainedly lost interest in Iranian oil—led to extensive exam-

ination and production of documents only to have plaintiff recant and admit that his basic premise was unfounded, and that no change of position occurred.

Finally, after examination of the appropriate Cities officials on every matter relevant to the claims plaintiff asserted, without producing an iota of evidence to support his speculations, plaintiff has retreated to the point where he has no contention remaining,—he now only asks the most conclusory question of all—did Cities conspire?

It is axiomatic that a deposition must be directly or indirectly germane to some issue of fact. Even under the broad Federal Rules, which permit examinations in order to find evidence, there must be some issue of fact as to which the evidence sought has a relationship.

In the case at bar, there is simply no issue of fact as to which an examination of other defendants could conceivably be pertinent.

Kuwait was alleged and abandoned.

Consortium was alleged and abandoned.

Turnabout was alleged and abandoned.

Sandberg was alleged and demolished.

Richfield Oil was alleged and must be abandoned in the face of the documented record.

And the speculative inquiry, "Why did Cities fail to take over the Iranian oil industry?" is not an issue of fact; it is a question. And the record supplies the answer to that question.

Finally, the remaining conclusory question, "Did Cities Service conspire?" is again not an issue of fact but a question as to an ultimate conclusion. And the answer to the

question supplied by the documentary record is a clear and indisputable "No."

Plaintiff has thoroughly examined Cities. He has not produced any specific facts, necessary under Rule 56(e). His case against Cities is destroyed by his own concessions and abandoned allegations, and by undisputed documents.

On the face of this record, Judge Herlands' denial of plaintiff's Rule 56(f) motion was clearly correct.

In affirming, the Court of Appeals recounted the extensive discovery which plaintiff had conducted of Cities and concluded:

> "Despite these more than ample opportunities to develop a basis for his action, plaintiff has been unable to do so, and has failed to demonstrate the existence of any genuine issue of fact. The court quite properly denied the Rule 56(f) motion for further discovery by which plaintiff sought to engage in still another 'fishing expedition' in the hope that he could come up with some tenable cause of action.
>
> "We are not unmindful that private anti-trust suits to some extent cast the plaintiff in the role of a 'private attorney general' and that such suits are favored, see e.g., *Lawlor* v. *National Screen Service Corp.*, 349 U. S. 322, 329 (1955); cf., *J. I. Case Co.* v. *Borak*, 377 U. S. 426, 432-433 (1964). Even so, it is apparent in this case that Waldron was given ample opportunity and scope in his shifting programs of discovery. The plaintiff, as a 'private attorney general,' may not seek indefinitely, within the period of limitations, to use the process to find evidence in support of a mere 'hunch' or 'suspicion' of a cause of action." (Petition, p. 39; 361 F. 2d at 673).

We submit that the Court of Appeals properly found that plaintiff had ample opportunity for discovery and that there was no abuse of discretion by the district court.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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